Supreme Court, U.S.
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No. 93-177

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARY CARLEY,

Petitioner,

v.

WHEELED COACH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 991 F.2d 1117; the opinion of the district court (Pet. App. 44a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 1993. On April 28, 1993, petitioner filed a document denominated "Petition for Rehearing In Banc Pursuant to F.R.A.P. 40(a)" which requested only rehearing en banc.[1] On May 14,

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[1] The petition requested that "this Court . . . reverse the decision of a panel of this Court in the captioned matter dated April 16, 1993," and nowhere suggested that it sought reconsideration by the panel. Under

1993, the court of appeals denied this petition. Pet. App. 54a. The petition for certiorari was filed on August 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case arises from injuries suffered by petitioner, Mary Carley, when an ambulance in which she was riding as a medical attendant turned over en route to the scene of an emergency. Petitioner filed suit against the manufacturer of the ambulance, respondent Wheeled Coach Industries, Inc. ("Wheeled Coach"),[2] in federal district court in the United States Virgin Islands, alleging strict products liability and breach of warranty on the ground that the ambulance was defective in its tendency to turn over because of an excessively high center of gravity. Pet. App. 2a-3a. Wheeled Coach asserted, *inter alia*, the government contractor defense recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and moved for summary judgment on the ground that the ambulance had been built in accordance with reasonably precise specifications approved by the federal government, and that the requirements for the defense had otherwise been met. *See id.* at 3a.

The record before the district court showed that the ambulance in issue was manufactured pursuant to a contract between Wheeled Coach and the General Services Administration, which required compliance with the Federal Specifications for the "Star-

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Rule 13.4 of this Court, such a suggestion for rehearing en banc does not toll the time for filing a petition for certiorari, and under that rule the instant petition appears to be untimely. It is unclear from the court of appeal's order whether it treated the April 28, 1993 petition as requesting exclusively rehearing en banc. *See* Third Cir. Int. Op. Proc. 9.5.1 (court will presume that petition for panel rehearing or suggestion for en banc rehearing requests both types of relief unless a petition for panel rehearing explicitly states that it does not seek rehearing en banc).

[2] Collins Industries is the parent company of Wheeled Coach. Wheeled Coach has no non-wholly owned subsidiaries.

of-Life Ambulance," KKK-A-1822B, dated June 1, 1985. Pet. App. 17a. Undisputed affidavits showed that the ambulance in question was built in accordance with those specifications, *id.* at 47a, which explicitly prescribed the acceptable limits for the vehicle's center of gravity. *Id.* at 18a.[3] On that record, the district court granted respondent's motion for summary judgment based on the government contractor defense.[4]

The United States Court of Appeals for the Third Circuit reversed and remanded for trial, on the ground that the summary judgment record did not establish as a matter of law the third prong of *Boyle*, requiring the contractor to warn the government

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[3] More specifically, the KKK-A-1822B specifications stated that "[t]he ambulance manufacturer shall locate the center of gravity (CG) of the ambulance/ambulance body to determine and assure the purchasers that the CG of the completed ambulance complies to the 'CG' parameters set by the chassis manufacturer." Pet. App. 18a. Ford Motor Company, as the manufacturer of the chassis, had in turn issued guidelines, which were presented to the district court, stating that the vertical distance from the ground to the completed vehicle center of gravity should not exceed 43 inches for vehicles, like this one, equal to or greater than 8,000 pounds. *Id.*

[4] While unsure as to whether the case was governed by federal common or Virgin Islands law, the court found it to be clear in either event that a government contractor defense exists which "can be asserted outside the military context," but noted also that "it is harder for a non-military contractor to persuade a court that the defense should be applied." Pet. App. 46a-47a. Applying the three-part test set forth in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988), the court also stated that petitioner failed to contest that the ambulance was built in compliance with comprehensive specifications promulgated by the government, and concluded that Wheeled Coach had no duty to warn of any hazard, since the government was, in its view, at least as aware of the tendency of vehicles to roll over as was Wheeled Coach. *See id.* at 47a.

of dangers known to the contractor but not to the government.[5] The court affirmed all other aspects of the district court's decision, including its holdings that the government contractor defense can apply to non-military equipment and that the first two prongs of *Boyle* had been established on the basis of undisputed facts.

Noting that *Boyle* itself had involved a military procurement contract, but that it had not addressed whether the government contractor defense is also available to manufacturers of non-military products (Pet. App. 4a-5a), the court of appeals reviewed in detail the reasoning of *Boyle*. *Id.* at 6a-11a. It concluded that "[t]he strongest reason for making the government contractor defense available to all contractors is the Court's express rejection of the *Feres* [*v. United States*, 340 U.S. 135 (1950)] doctrine as the basis of the defense, and its reliance instead on the discretionary function exception of the Federal Tort Claims Act ('FTCA'), 28 U.S.C. § 2680(a) (1988)." *Id.* at 8a. "After *Boyle*," said the court below, "the discretionary function exception to the FTCA indicates the scope of the government contractor defense." *Id.* at 11a. Citing numerous authorities for the proposition that the discretionary function exception is applicable to a range of non-military government procurement decisions, the court concluded that the government contractor defense is available to non-military contractors. *Id.* at 12a-13a.

Judge Becker, in dissent, cited the statement of the Court in *Boyle* that "[d]isplacement of state law with federal common law is permissible only where there exists a 'significant conflict . . . between an identifiable federal policy or interest and the operation of state law.'" Pet. App. 25a, quoting *Boyle*, 487 U.S. at 507. Recognizing the Court's invocation of the discretionary function exception as the central basis of the government contractor

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[5] Accordingly, upon remand the case will proceed to trial on petitioner's claims of strict products liability and breach of warranty, with the third prong of respondent's government contractor defense to be established on the basis of trial evidence.

defense, he argued nonetheless that the defense is not applicable simply because a design defect results from government conduct protected by that exception. Instead, the necessary "significant conflict" between federal interest and state law requires something more, which "exists only in the military context, where product safety must be balanced against national security." *Id.* at 26a.

ARGUMENT

Petitioner offers three reasons said to justify the granting of certiorari in this case. The decision of the court of appeals is correct and does not merit further review by this Court.

1. First, petitioner argues that the decision below is directly contrary to this Court's decision in *Boyle*. In so claiming, she ignores the core reasoning of that decision, which predicates the government contractor defense on the discretionary function exception to the waiver of sovereign immunity contained in the FTCA. Under that exception, the government may not be sued "based upon the exercise or performance . . . [of] a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a) (1988). The Court in *Boyle* reasoned that suits against contractors for executing design characteristics specifically approved by an exercise of governmental discretion "would produce the same effect sought to be avoided by the FTCA exception." 487 U.S. at 511. Accordingly, the Court recognized the government contractor defense as a matter of federal common law deriving from interpretation of the discretionary function exception.

There can be no doubt that that exception extends beyond the context of military equipment procurement. While the Court in *Boyle* applied what it repeatedly referred to as the "government contractor defense" to the specific facts before it involving a military procurement contract, nothing in the policies or language

of 28 U.S.C. § 2680(a) is limited to the military context.[6] The Court made clear that "the selection of the appropriate design for military equipment" was simply an example of a discretionary function within the meaning of the statute. *See* 487 U.S. at 511. In fact, while the tradeoff between greater safety and other considerations may be particularly acute with respect to military products, government makes precisely the same types of tradeoffs in the procurement of civilian products -- like ambulances -- that must be specially tailored for particular needs. All of the same financial burdens of judgments against contractors and the disadvantages of courts second-guessing the government's public policy decisions would fall on the United States regardless of whether the product at issue was made for the military.

2. Second, petitioner asserts that there is an irreconcilable split in the circuits, with the Ninth Circuit holding that the government contractor defense is categorically inapplicable to non-military contracts, and the Third Circuit in this case rejecting that view. While those two courts have expressly disagreed on the issue as narrowly framed by petitioner, it appears that the Ninth Circuit has yet to assert its announced position in a case where the defense would otherwise be applicable under the *Boyle* test.

The decision of the Ninth Circuit said to present a conflict, *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450 (9th Cir. 1990), reviewed a district court decision entered before *Boyle*, and thus without benefit of its three part test. As a result, the district court had rejected the government contractor defense for reasons no longer valid after *Boyle*,[7] but had granted

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[6] In contrast, the Court specifically rejected the *Feres* doctrine, which *is* limited to the military context, as the basis for the government contractor defense. Justice Brennan's dissent accordingly recognized that *Boyle* would be squarely applicable to a case like petitioner's. 487 U.S. at 516 (Brennan, J., dissenting). *See* note 7, *infra*.

[7] Prior to *Boyle*, Ninth Circuit precedent grounded the government contractor defense on the *Feres* doctrine, which applies only to members of the armed services. *See McKay v. Rockwell Int'l Corp.*, 704 F.2d

summary judgment for the defendant contractors on the ground that plaintiff's negligence and strict liability claims were foreclosed under Idaho law's contract specifications defense. The district court had also rejected plaintiff's failure to warn claim, finding no material issue of fact as to the adequacy of the warnings supplied by defendant.

The Ninth Circuit affirmed the judgment for defendant on the negligence and strict liability claims, but found triable issues of fact as to the failure to warn claim. In reversing summary judgment as to failure to warn, the court of appeals noted that "[t]he defendants have never pointed to any mandatory specification in a paint contract that describes warnings in a certain form for all containers of paint, or that precludes the inclusion of additional warnings." 892 F.2d at 1457. It thus appears that the *Nielsen* court's statement of the government contractor defense's inapplicability to non-military equipment was not necessary to the conclusion that the court reached, since the defense would have failed on its own terms for lack of reasonably precise government-approved specifications on the characteristic in issue.[8]

444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984). Because the plaintiff in *Nielsen* was a civilian, the district court determined that the defense did not apply. *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1453 (9th Cir. 1990).

[8] Although petitioner does not rely upon *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 810-812 (9th Cir. 1992), to establish the alleged circuit conflict, it is noteworthy that that opinion's exclusion of non-military equipment from the defense is also not necessary to the actual decision reached. In addition to the court's statement that the defense applies only in the military context, the court proceeded explicitly to consider the three part test set out in *Boyle*, and concluded that it would not have been met in any event. 960 F.2d at 812. As in *Nielsen*, the court concluded that with regard to the claim at issue -- that defendants failed to provide warnings about the hazards of their asbestos product -- the government specifications simply contained no relevant requirements at all. *Id.* at 813. Thus, the *Boyle* requirement that the

At the same time, the decision below in the instant case does not represent a final ruling that the government contractor defense is applicable on the facts existing here. On remand, it remains for respondent to establish that it has fulfilled the requirements of the third prong of the defense, concerning its duty to warn of any hazards known to it but not to the government. Thus, the alleged circuit conflict said to require review by this Court is between a Ninth Circuit decision on which the issue in dispute is not necessary to the outcome, and the decision below in which the applicability of the government contractor defense has yet to be determined.

It is also significant that it has taken five years following *Boyle* for even this arguable conflict limited to two circuits to develop.[9] For reasons set forth below, it appears that the military/non-military distinction on which review is sought only infrequently arises in a context where it would be dispositive.

3. The limited nature of the discretionary function exception, and the requirements of *Boyle*'s three-part test which derives from it, reveal, contrary to petitioner's third contention, why the issue

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government approve reasonably precise specifications relating to the injury-causing defect was not met.

[9] The court below, in a lengthy footnote (Pet. App. 5a), lists cases on both sides of the issue posed by petitioner. Of the nine cases listed there for the proposition that the defense applies only in the military context, two are the Ninth Circuit cases discussed above, three are pre-*Boyle*, and two are New York State trial court decisions which were not subjected to further review. Of the remaining two cases, *In re Chateaugay Corp.*, 146 B.R. 339 (S.D.N.Y. 1992), and *Pietz v. Orthopedic Equip. Co.*, 562 So.2d 152 (Ala. 1989), *cert. denied*, 498 U.S. 823 (1990), the latter simply asserts without analysis that the government contractor defense applies only to "military equipment," and does so almost immediately following a quotation of *Boyle* to the effect that air conditioners -- themselves not military equipment -- might fail to qualify for the defense not for that reason, but because they might lack sufficiently precise specifications. 562 So.2d at 154-55.

presented by this case is not one of such current practical importance as to demand the attention of this Court at this time. The discretionary function exception, as the Court emphasized in *Berkovitz v. United States*, 486 U.S. 531, 539 (1988), is a relatively narrow exception that "applies only to conduct that involves the permissible exercise of policy judgment."[10] *Accord*, *United States v. Gaubert*, 111 S. Ct. 1267, 1273 (1991). This requirement of an actual exercise of discretion concerning the conduct on which suit is brought has served to render the defense inapplicable in many cases.[11]

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[10] *Berkovitz* also made clear that where a government decisionmaker has no discretion, as when "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," *Berkovitz v. United States*, 486 U.S. 531, 536 (1988), the discretionary function exception does not apply. *See, e.g.*, *Phillips v. United States*, 956 F.2d 1071, 1076 (11th Cir. 1992) (exception did not bar personal injury suit by construction worker who fell from scaffold in Air Force hangar since Army Corps' inspectors failed to discharge mandatory responsibilities imposed by Corps' own regulations concerning safety inspections of scaffolds); *McMichael v. United States*, 856 F.2d 1026, 1033 (8th Cir. 1988) (exception did not bar claim resulting from plant explosion where Defense Department inspectors violated department's own policy directives by failing to comply with procedures requiring evacuation of plant during thunderstorms).

[11] *See, e.g.*, *Prescott v. United States*, 973 F.2d 696, 703 (9th Cir. 1992) (exception not applicable to nuclear testing program unless government could prove that exercise of discretion to make policy choices was explicitly delegated to test site officials and that officials' allegedly negligent actions flowed from choices based on social, economic, and political policy considerations); *Hayes v. United States*, 899 F.2d 438, 451 (5th Cir. 1990) (exception did not apply to FAA examiner's decision to permit further testing of pilot since decisions were merely part of day-to-day operational functions and not policy related); *Caplan v. United States*, 877 F.2d 1314, 1316-1317 (6th Cir. 1989) (exception did not bar personal injury claim by contractor hired to cut down live trees in national forest since failure to warn contractor of dangerous condition from presence of dead trees did not involve

In establishing the government contractor defense as a particular sub-species of the discretionary function exception, the Court in *Boyle* set forth three conditions that the contractor must meet.[12] The requirements imposed by these conditions make the defense inapplicable unless the government, by an exercise of discretion, prescribes specifications which address the design feature on which action is brought.[13] Thus, under *Boyle*, the defense is unavailable when the government orders standard production items -- whether air conditioners or military

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exercise of policy judgment); *Dube v. Pittsburgh Corning*, 870 F.2d 790, 796-97 (1st Cir. 1989) (exception applies only where government affirmatively adopts or considers a policy; fact that Navy could have considered and rejected policy of warning about asbestos not sufficient).

[12] The contractor must show that: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications, and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." 487 U.S. at 512.

[13] *See, e.g., Grispo v. Eagle-Picher Inds. (In re Joint Eastern and Southern Dist. N.Y. Asbestos Litig.)*, 897 F.2d 626, 630-632 (2d Cir. 1990) (rejecting five contractor arguments that "tend to lower the threshold of government involvement" in product development, and emphasizing that for the *Boyle* test to be met the government must have consciously imposed specifications on the contractor and the conflict between the specifications and state law must be direct); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1480 (5th Cir.) (government's "approval" under *Boyle* "requires more than a rubber stamp," and government must actually choose the design feature), *cert. denied*, 493 U.S. 935 (1989); *Garner v. Santoro*, 865 F.2d 629, 635-636 (5th Cir.) (observing "the difficulty that a defendant will have under *Boyle* in establishing an identifiable federal interest or policy in the existence or methods of warning and a significant conflict between that federal interest or policy and the operation of state law"); *cf. Beaver Valley Power Co. v. National Engineering & Contracting Co.*, 883 F.2d 1210, 1217 (3d Cir. 1989) (applying Pennsylvania law) (for defense to apply, government must actually consider pros and cons of a particular specification and not merely approve it in form only).

helicopters -- by a general specification that does not address the particular characteristic resulting in the injury. *See* 487 U.S. at 509.

Because a great and ever growing proportion of non-military procurement -- and even an increasing amount of military procurement -- is done by the purchase of commercial products in the marketplace, without utilization of detailed specifications,[14] it is easy to understand why there has been no flood of government contractor defense cases involving non-military products. Only in the comparatively rare case -- like that before the Court involving design of an ambulance -- can the explicit requirements of *Boyle* be met as to a design feature of a non-military product alleged to have caused injury. During the five years since *Boyle*, the test announced there, resting on the discretionary function exception, has functioned well on its own terms. It has not produced any significant divergence of results in the courts. There is, therefore, no need at present to consider whether *Boyle*'s explicit reliance on the discretionary function

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[14] For example, since the early 1970's an increasing amount of government procurement of items other than weapons or weapon-related systems has been conducted through the General Services Administration's Multiple Award Schedule program, which, as part of the Federal Supply Schedule Program, "provides Federal agencies with a simplified process of acquiring commonly used supplies and services in varying quantities at lower prices while obtaining discounts associated with volume buying." 48 C.F.R. § 38.101(a) (1992). Under the program, contracts are negotiated and awarded by GSA to manufacturers and suppliers of the same generic items when "[i]t is not practical to draft specifications or other descriptions for the required supplies or services and there are multiple suppliers able to furnish similar commercial supplies or services[.]" 48 C.F.R. § 38.102-2(b)(1). The products are identified on a schedule at specific prices for selection by multiple government agencies. *See* 48 C.F.R. § 38.102-2(a). *See also* Lisa Corbin, *Procurement and Contracting: 10 Hot Issues*, National Journal, May 1993 (reporting trend that "[a]gencies will continue to purchase more commercial, off-the-shelf products instead of custom-made equipment, which is generally a lot more expensive").

exception must somehow be qualified to exclude non-military products -- least of all in a case like this one where it is yet to be determined at the trial level that the government contractor defense is in fact applicable.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

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